REMARKS

Applicant requests reconsideration and further examination of Application Number 10/645,186.

Amendments

No new matter has been added to the above-referenced application.

Paragraphs 23, 26, 27, 55, 76 and 90 of the original application as published have been amended with this submission, and claims 1-70 appear in this submission for the Examiner's review.

Paragraphs 23, 26 and 55 are amended to correct typographical errors.

Paragraph 27 is amended to correct typographical errors and to incorporate peelable seal strength parameters for a peelable seal. Basis for incorporating such parameters is found in claims 18-20 as originally filed.

Paragraph 76 is amended to correct a typographical error and to explain how the seal strengths in the application can range from 500 grams for a one inch strip to greater than 6 kilograms for a one inch strip and yet all describe a seal that is peelable. Basis for this explanation is found in the nature of the fin seal versus the nature of the lap seal. The nature of the fin seal is described in the original application as follows:

> Another embodiment of the present invention is illustrated in FIG. 8, generally as bag 15b. . . . Bag 15b includes a first fin seal 116 joining the first and second sides 30a and 30b of bag wall 30 such that the inner film surfaces 19 of each side are in a face-to-face abutment, having a fin seal interface 117. . . . Bag 15a (FIG. 5) is preferred over bag 15b, since the plane of the first seal 16 is parallel to the plane of the shrink forces encountered during the heat-shrinking process. The first fin seal 116 of bag 15b places the plane of the heat seal perpendicular to the shrink forces (as shown by arrows Z' and Z" in FIG. 10), which increases the risk of seal failure (premature peeling) during the heat-shrinking process. Additionally, since the inventive receptacles are advantageously fabricated from a single sheet or web of film, then a fin seal arrangement, such as first seal 116, requires that each seal of the receptacle be a peelable seal. Also, the second seal 20 and final closing seal (not shown) are also necessarily peelable since the first and second bag walls 30a and 30b are sealed with the film in the same abutted relationship. For example, FIG. 10 depicts an enlarged view of the first fin seal 116 shown in cross-section showing discrete layers of the preferred film discussed above with bags 15 and 15a. Each wall 50 and 52 of the seal 116 includes a three layer peelable system (the tie layer 37) equidistant from and proximate to the sealed interface of sealant layer 38. Thus, it

> not only cannot be predetermined in which wall 50 or 52 the peel failure will occur, but all seals are easily peeled and the shrink force direction further reduces the ability to make strong seals. For all these disadvantages this embodiment is least favored.

(Page 15 line 24 – Page 16 line 18 of the original application as filed; Paragraph 48 of the original application as published.) The nature of the lap seal is described in the original application as follows:

> Referring to FIG. 4, a fragmentary sectional view taken along lines B-B of FIG. 2 illustrates how a preferred embodiment of the invention works to create strong end seals while permitting the lap seal to function as an easy to open peel seal. In FIG. 4, film 11 has an outer surface 33 with consecutive layers therefrom of outer surface layer 38, tie layer 37, core layer 36, barrier layer 35, and inner surface heat sealing layer 34. Referring to FIG. 2, the second seal 20 is provided across tube member 18 to collapse its surface 19 upon itself. Referring again to FIG. 4, this seal joins inner surface heat sealing layer 34 to itself with the peelable tie layer 37 being positioned distal from end seal interface 39. This preferred embodiment of the invention depicted in FIGS. 2-4 combines (a) an end seal which mates like materials with strong seal properties to each other keeping distal the easily peelable tie layer 37 and (b) a lap seal having peelable tie layer 37 proximate the outer surface heat sealing layer 38 and lap seal interface 32, thereby providing an easily peelable opening in bags or packages made using the described configuration.
>
> The film 11 is designed to control the film failure when peeled manually. Due to the composition of the peelable tie layer 37, its location proximate the lap seal interface 32, and in the case of the preferred three layer peelable system, the thinness and composition of the outer surface heat sealing layer 38; as the second side edge 12b is manually pulled across, up and away from the lap seal 16, a first rupture or tear will begin. This tear will propagate from the heat seal at the edge 17b of lap seal interface 32 through the outer heat sealing layer 38 thereof. If the peelable bond is designed to occur at the tie layer 37, the continued application of opening force causes: a delamination or breaking of the adhesive bond, along the tie layer 37/outer heat sealing layer 38 interface or along the tie layer 37/core layer 36 interface and/or causes fracture of the tie layer 37, or a combination thereof until the tear reaches the opposite side edge 17a of the heat seal 16, where the tear either propagates to edge 12a or back across the outer layer 38 and the bag is thereby opened.

(Page 13 line 8 – Page 14 line 7 of the original application as filed; Paragraphs 42 and 43 of the original application as published.) Particular attention is drawn to the statement in the description of the lap seal explaining, "[A]s the second side edge 12b is manually pulled across, up and away from the lap seal, a first rupture or tear will begin." (Page 13 lines 24-25 of the original application as filed.) Additionally basis for this amendment to Paragraph 76, explaining how the various seal strengths all describe a peelable seal, may be found at Page 7 line 26 – Page 8 line 3 of the original application as filed (portion of Paragraph 27 of the original application as published):

> In the present invention, the peelable seal must have a seal strength sufficient to prevent failure of the seal during the normal heat-shrinking process and further normal handling and transport of the packaged article. The seal strength must also be low enough to permit manual opening of the seal.

Paragraph 90 is amended to correct a typographical error and to incorporate seal strength and peelable seal strength parameters for a peelable seal. Basis for incorporating such parameters is found in claims 18-20 and 64-65 as originally filed.

Claims 1, 3, 6, 10, 18-19, 36, 43, 50, 52 and 64-66 have been amended with this submission. Claim 1 is amended to specify the first seal as peelable seal and as a lap seal, a butt-seal tape or a seal strip; basis for these amendments is found in previous version of claim 1 (stating that at least one of the first and second seals is peelable), in now-cancelled claim 2 (stating the first seal to be a lap seal, a fin seal, a butt-seal or a seal strip) and in now-amended claim 3 (stating the butt-seal includes a butt-seal tape). Claim 3 is amended in light of the amendments to claim 1. Claim 6 is amended to correct dependency in light of other amendments. Claim 10 is amended in light of amendments to claim 1. Claims 18 and 19 are amended in light of amendments to claim 1. Claim 36 is amended to correct a previously unrecognized typographically error regarding dependency. Claim 43 is amended to specify the second seal as a nonpeelable seal; basis for this amendment is found in claim 34. Claim 50 is amended to specify the heat-shrinkable film as comprising a multilayer barrier film, to specify the first seal as a continuous seal having a peelable seal strength of less than 2 kilograms for a one inch strip, and to specify the second seal as having a seal strength of greater than 3 kilograms per inch; basis for these amendments is found in now-cancelled claim 51 (stating that the heat-shrinkable film comprises a multilayer barrier film), at Page 5 line 24 – Page 6 line 8 and Page 26 lines 2-3 of the original application as filed (stating that the first seal is continuous), in previous version of claim 18 (stating that the peelable first seal has a seal strength of less than 2 kilograms for a one inch strip) and in claim 66 (stating that the second seal has a seal strength of greater than 3 kilograms per inch) . Claim 52 is amended in light of amendments to claim 50. Claims 64-66 are amended to correct dependency in light of other amendments.

Claims 2, 14, 20, 51 and 63 have been canceled with this submission.

Claims 37 and 44-49 have been previously cancelled.

Claims 33, 38-40, 54 and 62 have been previously presented.

Claims 4-5, 7-9, 11-13, 15-17, 21-32, 34-35, 41-42, 53, 55-61 and 67-69 are original.

Claim 70 is new, specifying that the first seal of claim 1 may connect the first side of the sheet of film to the second side of the sheet of film along the lengths of each side and be continuous. Basis for this new dependent claim is found in claims 43 and 50 as originally filed. Additionally basis is found in the following statements (from Page 5 line 24 – Page 6 line 8 of the original application as filed / portion of Paragraph 24 of the original application as published and from Page 26 lines 2-3 of the original application as filed / portion of Paragraph 89 of the original application as published):

> It should be noted that while said lap seal 16 is depicted as a continuous elongated rectangle extending from side 12c to side 12d, the invention further contemplates that the seal shape may vary and could, for example, form a wavy line or zigzag shape or other shapes as desired. . . . It is further contemplated that said lap seal 16, while depicted as a continuous lap seal 16 suitable for forming a hermetic package, it is also contemplated that for some applications, e.g., for certain industrial or non-perishable items, a noncontinuous seal having, e.g., the appearance of a dotted or dashed line, may be employed.
>
> The film is then fed into the bag making equipment to form a tube member having a continuous longitudinally extending lap seal.

Applicant's Response to October 9, 2007 Office Action

As stated in Paragraph 5 of the October 9, 2007 Office Action, claims 1-36, 38-43 and 50-69 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over Donovan et al. (U.S. Patent No. 5,888,648) in view of Ramesh et al. (U.S. Patent No. 6,221,410). The applicant respectfully traverses and requests that the Examiner withdraw the rejection and allow the pending claims (i.e., claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70) of the present application.

Graham v. John Deere Co. of Kansas City, 148 USPQ 459 (1966) provides the framework for the objective analysis for determining obviousness under 35 U.S.C. §103(a):

> While the ultimate question of patent validity is one of law [citation omitted], the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

Id. at 467. For the present application, the Examiner has failed to correctly conduct an adequate Graham analysis and has erred substantively as to factual findings regarding (1) the combination of a peelable sealant with a shrink film and (2) peelable seals. Additionally, secondary considerations indicate that the claims of the present application are patentable over Donovan and Donovan in view of Ramesh.

Substantive Errors Regarding Combination of Peelable Sealant with a Shrink Film

Donovan discloses a multi-layer film comprising a sealant layer and a main film substrate. (Claim 1.) Donovan further discloses that the multi-layer film is hermetically sealable and defines "hermetic seals" as including both peelable and nonpeelable seals. (Column 6 lines 16-28.) Donovan also discloses that the main film substrate "can be those single or multiple-layer films used in the art of packaging in order to provide simple or enhanced barrier properties for maintenance of package contents." (Column 9 lines 55-58.) On Page 3 line 15 of the October 9, 2007 Office Action the Examiner states, "Donovan et al. fail to teach that the polymeric film is heat shrinkable." The applicant presumes that the Examiner means that Donovan fails to teach that the main film substrate is heat shrinkable. However, contrary to the Examiner's statement and contrary to the applicant's prior positions, Donovan does disclose a heat-shrinkable main film substrate. Donovan mentions U.S. Patent No. 4,582,752 to Duncan. (Column 10 lines 30-31.) This patent is titled "Heat shrinkable, lustrous satin appearing, opaque film compositions." Donovan further states, "The Duncan patents are incorporated herein by reference, and the inventors contemplate the use of the Duncan films as main film substrates in conjunction with the present

invention." (Column 10 lines 37-40.) Donovan discloses a sealant layer that may be peelable or nonpeelable and a main film substrate that may be shrinkable or non-shrinkable. However, Donovan does not disclose the combination of a peelable sealant layer with a shrinkable main film substrate.

As previously explained by the applicant, a person of ordinary skill in the art would not combine a peelable sealant layer with a shrinkable main film substrate. The applicant explains,

> The known bags for heat-shrink packaging include strong factory and final closing seals to prevent the heat sealed seams from pulling apart during the heat shrinking operation, or during the handling and transport of the packaged article. Although the strong heat seals provide protection against unwanted seal failure, such seals also make it difficult for the end user to open the package. Accordingly, there is needed an improved heat-shrinkable packaging receptacle that includes seals of sufficient seal strength to survive the heat shrinking process and handling and resist spontaneous opening due to residual shrink forces, yet includes at least one heat seal that is readily openable by application of force without requiring use of knife or cutting implement and without uncontrolled or random tearing or rupturing of the packaging materials, *e.g.* away from the seal area, which may result in opening in undesired location or in sudden destruction of the package and inadvertent contamination or spillage of the contents of the package.

(Page 2 line 22 – Page 3 line 7 of the original application as filed; Paragraph 5 of the original application as published.) It is common sense to a person of ordinary skill in the art to not combine a peelable sealant layer with a shrinkable main film substrate, as typically (without benefit of the present application) the shrink forces in the main film substrate would, more than likely, cause the peelable sealant layer to pull apart during the heat shrinking operation; and the package would be destroyed and no longer functional. The common sense of a person of ordinary skill in the art demonstrates why the combination of a peelable sealant layer with a shrinkable main film substrate is not obvious. As explained by the Federal Circuit in Leapfrog Enterprises Inc. v. Fisher-Price Inc., 82 USPQ2d 1687 (Fed. Cir. 2007),

> An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not. See KSR Int'l Co. v. Teleflex Inc., 550 U.S. ___, 2007 WL 1237837, at *12 [82 USPQ2d 1385] (2007) [quotation omitted].

(Leapfrog Enterprises, 82 USPQ2d at 1690-1691.) "[P]roceeding contrary to accepted wisdom in the art is evidence of nonobviousness." (M.P.E.P. § 2145X.D.3. Eighth Edition,

August 2001, Latest Revision September 2007, citing In re Hedges, 783 F.2d 1038, 228 USPQ 685 (Fed. Cir. 1986).)

In citing Donovan (or Donovan in view of Ramesh) the Examiner has failed to meet the burden of showing that it is more probable than not that a person of ordinary skill in the art would combine a peelable sealant layer with a shrinkable main film substrate. It is just as likely, if not more so, that a person or ordinary skill in the art would combine a nonpeelable sealant layer with a shrinkable main film substrate. The Examiner states,

> [O]ne of ordinary skill in the art would have recognized to have used the heat-shrinkable biaxially oriented polypropylene film of Ramesh et al. as the oriented polypropylene film of Donovan et al. since heat-shrinkable biaxially oriented polypropylene films are well known oriented polypropylene films for use in packaging meat products such as poultry and ham as taught by Ramesh et al.

(October 9, 2007 Office Action, Page 3 line 20 – Page 4 line 2.) Setting aside the accuracy or inaccuracy of this statement, the issue is not whether a heat-shrinkable film may be used with Donovan but whether a heat-shrinkable main film substrate is to be used with a peelable sealant layer. As explained by Judge Plager in his concurrence in In re Oetiker, 24 USPQ2d 1443, 1447 (Federal Circuit 1992), "In rejecting an application, factual determinations by the PTO must be based on a preponderance of the evidence and legal conclusions must be correct" [internal citation omitted]. For the preponderance of the evidence standard, "the existence of a fact is more probable than its nonexistence." (In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).) And M.P.E.P. § 2142 Eighth Edition, August 2001, Latest Revision September 2007 counsels examiners as follows:

> With regard to rejections under 35 U.S.C. 103, the examiner must provide evidence which as a whole shows that the legal determination sought to be proved (i.e., the reference teachings establish a *prima facie* case of obviousness) is more probable than not.

The Examiner has failed to show that the combination of a peelable sealant layer with a shrinkable main film substrate is more probable than not. In stating that such a combination is obvious, the Examiner has conducted an impermissible and inaccurate "picking and choosing" of elements to somehow arrive at the claims of the present application. As explained in Ex parte Clapp (and in line with the KSR, 82 USPQ2d at 1396,

where combination and modification require "an apparent reason," "some articulated reasoning," "identif[ication of] a reason," etc.),

> Presuming arguendo that the references show the elements or concepts urged by the examiner, the examiner has presented no line of reasoning, and we know of none, as to why the artisan viewing only the collective teachings of the references would have found it obvious to *selectively pick and choose various elements and/or concepts* from the several references relied on to arrive at the claimed invention. In the instant application, the examiner has done little more than cite references to show that one or more elements or subcombinations thereof, when each is viewed in a vacuum, is known. . . . To support the conclusion that the claimed combination is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed combination or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references. We find nothing in the references that would expressly or impliedly teach or suggest the modifications urged by the examiner. Additionally, as aforementioned, we find no line of reasoning in the answer, and we know of none, as to why the artisan would have found the modifications urged by the examiner to have been obvious. Based upon the record before us, we are convinced that *the artisan would not have found it obvious to selectively pick and choose elements or concepts* from the various references so as to arrive at the claimed invention without using the claims as a guide.

(Emphasis added, Ex parte Clapp, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985).)

Each of the pending claims of the present application as amended (i.e., claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70) specifies a peelable first seal in an end-sealed packaging bag formed from a sheet of a heat-shrinkable film. Donovan or Donovan in view of Ramesh fails to specifically disclose such a combination. Furthermore, such a combination is not obvious as compared to Donovan or Donovan in view of Ramesh. In fact, as explained above, common sense dictates that such a combination is not obvious. Donovan or Donovan in view of Ramesh does not teach or suggest all the claim limitations of claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70 of the present application. As such, the claims of the present application are patentable over Donovan and Ramesh.

Substantive Errors Regarding Peelable Seals

In the October 9, 2007 Office Action, the Examiner characterizes Donovan as teaching "end seal 15 in Fig. 1 and end seal 26 in Fig. 2 are easily opened" and cites

"Ramesh et al. [sic, Donovan et al.] at col. 3, lines 8-9 [sic, 58-59]." (Page 3 lines 2-3.)

However, Column 3 lines 55-61 of Donovan reads as follows:

> As a result of identifying as separate functions, the requirements of filling inter-jaw space and providing an adhesive surface, the inventors herein have enabled the packaging artisan to design highly effective, easily-opened and reclosable seals, i.e., peelable heremtic seals, which can be implemented on existing form/fill/seal apparatus.

As cited by the Examiner, Donovan includes no specific teaching as to which seal(s) is (are) peelable and includes no specific teaching of end seal 15 in Figure 1 and end seal 26 in Figure 2 as easily opened.

Additionally, in the October 9, 2007 Office Action, the Examiner characterizes Donovan as teaching "at least one of the first and second seals comprises a peelable seal" and cites "col. 6, lines 16-28." (Page 3 lines 8-9). However, Column 16 lines 16-28 of Donovan reads as follows:

> The present invention is a multi-layer film which is hermetically sealable and a method of improving the seal characteristics of multi-layer films which are hermetically sealable in high-speed packaging machines. In order to provide a hermetic seal to packages formed from multilayer films, care must be taken to provide a sealing medium which accommodates the nature of the barrier film used for the package, i.e., its modulus or stiffness, thickness, adversity to temperature and pressure imposed under sealing conditions, etc. "Hermetic seals" as used herein means both peelable and unpeelable seals which provide hermetic barrier properties, i.e., does not permit passage of a gas.

As cited by the Examiner, Donovan includes no specific teaching of at least one of a specific first and specific second seal comprising a peelable seal.

Also, in the October 9, 2007 Office Action, the Examiner characterizes Donovan as teaching "that the first seal is a lap seal (item 13, Fig. 1) and a peelable seal (col. 8, lines 47-52)." (Page 3 lines 13-14.) However, Column 8 lines 47-52 reads as follows:

> Referring now to the drawings, the present invention is explained in relationship to lap seal and fin seal packages. FIG. 1 is a schematic representation of a package 10 formed by closing a multi-layer film by a lap seal. A multi-layer film web 14 has been closed to form the package 10 by joining web edges 11 and 12 at an overlap 13.

As cited by the Examiner, Donovan discloses a lap seal but includes no specific teaching of a lap seal as a peelable seal and no mention of peelability of this specific seal.

Additionally, in the October 9, 2007 Office Action, the Examiner characterizes Donovan as teaching "that the first seal is peelable (col. 6, lines 16-28)." (Page 4 line 21.) However, as stated above, Column 6 lines 16-28 reads as follows:

> The present invention is a multi-layer film which is hermetically sealable and a method of improving the seal characteristics of multi-layer films which are hermetically sealable in high-speed packaging machines. In order to provide a hermetic seal to packages formed from multilayer films, care must be taken to provide a sealing medium which accommodates the nature of the barrier film used for the package, i.e., its modulus or stiffness, thickness, adversity to temperature and pressure imposed under sealing conditions, etc. "Hermetic seals" as used herein means both peelable and unpeelable seals which provide hermetic barrier properties, i.e., does not permit passage of a gas.

As cited by the Examiner, Donovan includes no specific teaching of a first seal as peelable.

Also, in the October 9, 2007 Office Action, the Examiner characterizes Donovan as teaching "that the first and second seals are peelable (col., 6, lines 16-28)." (Page 5 lines 9-10). (And the Examiner fails to note the distinction in claim 4 between the first and second seals of the packaging bag and the first and second heat seals of the butt seal tape.) However, as stated above, Column 6 lines 16-28 includes no specific teaching of a first seal as peelable and, as cited by the Examiner, includes no specific teaching of a second seal as peelable. At Page 5 lines 12-13, the Examiner repeats the inerrant characterization that Donovan teaches that the first and second seals are peelable, again citing Column 6 lines 16-28.

At Page 6 lines 1-2, the Examiner characterizes Donovan as teaching that the first and second heat seals are peelable seals, citing Column 6 lines 20-27. (In this instance, the Examiner fails to note the distinction between the first and second seals of the packaging bag and the first and second heat seals of the seal strip.) As stated above, Column 6 lines 20-27 includes no specific teaching of a specific first and a specific second seal as peelable and, additionally, includes no specific teaching of a specific first and a specific second heat seal as peelable.

Additionally, in the October 9, 2007 Office Action, the Examiner states, "Donovan et al. teach that the second seal is nonpeelable (col. 6, lines 16-28)." (Page 9 lines 13-14.)

However, as stated above, Column 6 lines 16-28 includes no specific teaching of a specific second seal as nonpeelable.

At Page 6 line 14 of the October 9, 2007 Office Action, the Examiner states, "Donovan et al. teach that the seals are peelable (col. 6, lines 16-28)." As cited by the Examiner, Donovan does disclose peelable seals. However, as explained and detailed above, Donovan includes no specific teaching of a specific first seal as peelable or of a specific second seal as peelable or nonpeelable.

Donovan discusses bags and pouches. (Column 1 line 17). Donovan, in part, desires to eliminate the problem of z-direction tears to improve openability and reclosability. As explained at Column 2, lines 34-54,

> Additionally, it is also desirable to have provide seals which can be readily opened by the consumer without creating a "z-direction" tear. A z-direction tear is one which causes the disruption of the integrity of the multi-layer film when the film is pulled apart at the seal. . . . As a result of z-direction tears, it is difficult to reclose such packages to maintain freshness of the contents. When z-direction tears can be eliminated, packages are easily refolded and sealed by a mechanical means such as a clip imposed over the folds of the once-opened package. . . It is desirable to produce a package which will separate along the seal during opening so that the package can be easily reclosed and secured against passage of air.

From this discussion of eliminating z-direction tears, the bag and/or pouch of Donovan is to be opened at the second end-seal, not at the first lap seal or fin seal; most individuals do not seek to reclose a bag or a pouch at the lap seal or the fin seal but at the end seal. It therefore follows that, while Donovan does not specifically disclose it as such, the seal most likely to be peelable in Donovan is the second end seal, not the first lap seal.

In characterizing Donovan as specifically teaching a first seal as peelable, the Examiner is impermissible reading the claims of the present application into Donovan and including "knowledge gleaned only from applicant's disclosure." (See In re McLaughlin, 170 USPQ 209, 212 (CCPA 1971).) As explained by the Federal Circuit in Interconnect Planning Co. v. Feil, 227 USPQ 543, 547 (Fed. Cir. 1985), "The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time."

Each of the pending claims of the present application, as amended, (i.e., claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70) specifies the first seal as peelable. A peelable first seal is not specifically disclosed in Donovan. (And Ramesh makes no mention of peelability.) Furthermore, such peelable first seal is not obvious as compared to Donovan or to Donovan in view of Ramesh. As explained by applicant in contrasting fin seals with lap seals, whether a first seal is specifically peelable (and whether a second seal is specifically peelable or nonpeelable) may affect the efficacy of the package:

> Another embodiment of the present invention is illustrated in FIG. 8, generally as bag 15b. . . . Bag 15b includes a first fin seal 116 joining the first and second sides 30a and 30b of bag wall 30 such that the inner film surfaces 19 of each side are in a face-to-face abutment, having a fin seal interface 117. . . . Bag 15a (FIG. 5) is preferred over bag 15b, since the plane of the first seal 16 is parallel to the plane of the shrink forces encountered during the heat-shrinking process. The first fin seal 116 of bag 15b places the plane of the heat seal perpendicular to the shrink forces (as shown by arrows Z' and Z" in FIG. 10), which increases the risk of seal failure (premature peeling) during the heat-shrinking process. Additionally, since the inventive receptacles are advantageously fabricated from a single sheet or web of film, then *a fin seal arrangement, such as first seal 116, requires that each seal of the receptacle be a peelable seal. Also, the second seal 20 and final closing seal (not shown) are also necessarily peelable since the first and second bag walls 30a and 30b are sealed with the film in the same abutted relationship.* For example, FIG. 10 depicts an enlarged view of the first fin seal 116 shown in cross-section showing discrete layers of the preferred film discussed above with bags 15 and 15a. Each wall 50 and 52 of the seal 116 includes a three layer peelable system (the tie layer 37) equidistant from and proximate to the sealed interface of sealant layer 38. *Thus, it not only cannot be predetermined in which wall 50 or 52 the peel failure will occur, but all seals are easily peeled and the shrink force direction further reduces the ability to make strong seals. For all these disadvantages this embodiment is least favored.*

(Emphasis added, Page 15 line 23 – Page 16 line 19 of the original application as filed / Paragraph 48 of the original application as published.)

Donovan or Donovan in view of Ramesh does not teach or suggest all the claim limitations of claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70 of the present application. As such, the claims of the present application are patentable over Donovan and Donovan in view of Ramesh.

Secondary Considerations

Additional support for the patentability of each of the pending claims of the present application (i.e., claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70) is the presence of objective evidence related to long-felt but unresolved needs, recognition of the problem and copying of the invention. As recently re-iterated by the Federal Circuit in Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc., and Mylan Pharmaceuticals, Inc., ___ USPQ2d ___ (Fed. Cir. 2008, decided March 31, 2008),

> As this court has repeatedly explained, this evidence is not just a cumulative or confirmatory part of the obviousness calculus but constitutes independent evidence of nonobviousness. Catalina Lighting, Inc. v. Lamps Plus, Inc., 295 F.3d 1277, 1288 (Fed. Cir. 2002) ("Objective indicia may often be the most probative and cogent evidence of nonobviousness in the record." (internal citation omitted).

(Ortho-McNeil, slip opinion page 11-12.) For the present application, the objective indicia providing probative and cogent evidence of nonobviousness is a recent patent application from Cryovac, Inc. This application is International Application PCT/EP2007/000635, titled "Hermetically sealed, easy-openable, flexible container of heat-shrinkable thermoplastic material," published as WO 2007/088005 on August 9, 2007, and citing priority to a European application filed January 31, 2006 (post-dating the priority date of the present application by almost three years). In this application, Cryovac provides the following Background of the Invention:

> Particularly with food products, the flexible container is very often made of heat-shrinkable thermoplastic material. In such a case, first the product is loaded into the flexible container, then air is removed and the open end of the container is closed by a heat-sealing step, and finally the sealed and vacuumized package is submitted to a heat- treatment to get the shrink of the packaging material tightly around the packaged product. While the opening of plastic bags and pouches is a problem that in general needs improving, in case of vacuumized and shrunk bags opening of the end package to reach the packaged product may become a real problem if no cutting tools are available. It is therefore desirable to provide the flexible container with so-called easy-opening means, i.e., a feature or a combination of features that would enable the end user to easily open the package by hand.

(Page 1 lines 16-26.) Cryovac then mentions five U.S. Patents (3,516,537; 3,641,732; 3,391,851; 5,413,412; and 4,958,735), noting the drawbacks and disadvantages of each in attempting to provide an easy-openable heat-shrinkable package, and concludes,

> There is therefore still a need for flexible containers provided with improved easy opening means. It is thus an object of the present invention to provide an easy-openable flexible container of heat-shrinkable thermoplastic material that can be sealed in a tight, hermetic manner, to safely secure the packaged product, can be employed for the packaging of any type of products, and can be manufactured easily. . . . The multi-layer heat-shrinkable film that can suitably be employed for the manufacture of the easy-peelable and hermetically sealable bag of the present invention contains at least three layers, a first outer heat-sealing layer (a), a second outer layer (b) and, directly adhered to the heat-sealing layer (a), an internal cohesive failure layer (c).

(Page 3 lines 3-9; Page 9 lines 6-9.) Cryovac is a direct wholly-owned subsidiary of Sealed Air Corporation. In the Form 10-K (Annual Report) filed February 29, 2008 for the period ending December 31, 2007, Sealed Air states, "The Company believes that it is one of the leading suppliers of . . . shrink films for industrial and commercial applications . . . in the principal geographic areas in which it sells these products." (Page 6.) And it is believed that Cryovac holds an 80% market share in shrink bags. The market leader for and the leading supplier of shrink bags states that there is a long-felt need for (as stated by applicant in the application as filed) a "heat-shrinkable packaging receptacle that . . . includes at least one heat seal that is readily openable by application for force without requiring use of a knife or cutting implement." (Page 3 lines 1-4 of the original application as filed; portion of Paragraph 5 of the original application as published.) The market leader for and the leading supplier of shrink bags recognizes the problem and the drawbacks and disadvantages of past attempts to solve the problem. The market leader for and the leading supplier of shrink bags attempts to provide a solution to the problem similar to that provided by the applicant in the present application three years prior. The long-felt need expressed, the problem recognized and the copying by Cryovac each provides cogent and probative evidence of the nonobviousness of the claims of the present application. Therefore, claims 1, 3-13, 15-19, 21-36, 38-43, 50, 52-62 and 64-70 of the present application are patentable. The applicant respectfully requests that the Examiner withdraw the outstanding rejections and allow the pending claims.

Conclusion

In view of the above remarks and amendments, applicant respectfully submits that the Examiner erred substantively as to the factual findings regarding (1) the combination of a peelable sealant with a shrink film and (2) peelable seals. Additionally, secondary considerations indicate that the claims of the present application are patentable over Donovan and Donovan in view of Ramesh. The applicant submits that the claims are patentable and in condition for allowance. If a telephone conference would expedite allowance of the claims, the Examiner may contact the applicant via applicant's attorney at (920) 303-7970.

If the Examiner does not agree that the claims are patentable and in condition for allowance, the applicant respectfully requests an in-person interview to further explain and demonstrate the present application.

Respectfully submitted,

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